83-173

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

MILTON R. WASMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a sentence may be enhanced following re-trial and re-conviction after a first conviction is reversed on appeal based upon conduct of a defendant which occurred prior to the first sentencing hearing?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family, and the United States of America.

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NO.

IN THE
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MILTON R. WASMAN,
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vs.

UNITED STATES OF AMERICA,
Respondent.

Petitioner, MILTON R. WASMAN, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion, and order of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 17, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto and is reported as United States v. Wasman, 700 F.2d 663 (11th Cir. 1983). A petition for re-hearing and/or suggestion for re-hearing en banc was rejected on June 2, 1983, and a copy of the rejection is included in the Appendix. A copy of the transcript of the sentencing hearing in the district court (the subject of the issue presented for review) is also contained in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment from which review is sought was rendered March 17, 1983. An order denying re-hearing was entered June 2,1983. Thus, this petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person shall...be deprived of...liberty...without due process of law....

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

Petitioner, MILTON R. WASMAN, was charged by a Federal Grand Jury in the Southern District of Florida in a one count indictment with wilfully and knowingly making false statements in an application for a passport with the intent to induce and secure the issuance of a passport in violation of 18 U.S.C. §1542.

The case went to trial in September of 1979 and the Petitioner was found guilty as charged. He was sentenced to two (2) years incarceration but pursuant to the split sentencing provision of 18 U.S.C. §3651, whereby the sentence was to run as follows: the Petitioner would serve a period of six (6) months confinement thereafter the remainder of the sentence of confinement would be suspended and he would be placed on three (3) years probation.

The Petitioner's appeal from that sentence resulted in the reversal of that prior judgment of conviction and a remand for a new trial. United States v. Wasman, 641 F.2d 326 (5th Cir.1981).

The case was again called for trial in July of 1981 and a jury again found the Petitioner guilty. In August of 1981 he was sentenced to two years incarceration.

Following a denial of a motion to stay the issuance of the mandate in the Eleventh Circuit, an application for stay was filed in this Court. On June 27, 1983, Justice Lewis F. Powell granted that application. A copy of Justice Powell's Order is included in the Appendix.

STATEMENT OF NECESSARY FACTS

1.) The Charge

The indictment charged that

on or about March 1, 1978, the Petitioner wilfully and knowingly made a false statement on an application for a passport, in that the Petitioner, MILTON WASMAN, applied for a passport representing that his name was David Hibbert Hendrick, Jr., born September 12, 1914, Knoxville, Pennsylvania, and that a photograph of himself was that of Hendrick, knowing that such statements and representations were false. There was never really any dispute as to the fact that the Petitioner obtained a passport in the name of Hendrick, a deceased law school classmate. The dispute carried on through two trials and appeals related to intent and the reasons of the Petitioner.[1]

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[1] See proffer set out in the first Wasman case, United States v. Wasman, 641 F.2d 326,328 (5th Cir.1981) and the background section of the second opinion. United States v. Wasman, 700 F.2d 663,665 (11th Cir.1983)(App. p.A 4-7)

2.) The Enhanced Sentence

Following his first conviction, the Petitioner was sentenced to two (2) years incarceration, but pursuant to the split sentence provision of 18 U.S.C. §3651, whereby he was to serve six months incarceration and then be placed on three (3) years probation. From that conviction and sentence, WASMAN appealed.

While his appeal was pending in the Fifth Circuit, the Petitioner entered a plea of nolo contendere to a misdemeanor charge of possession of false certificates of deposit [18 U.S.C. §480]. That plea, also entered consistent with the rationale of North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160(1970), was a negotiated one, whereby the Government dismissed a mail fraud indictment in return for the misdemeanor

nolo plea. That mail fraud indictment had been pending at the time of the Petitioner's sentencing in the passport case with the underlying facts having occurred a number of years earlier.

Following a lengthy sentencing hearing in the false certificates case in which it was noted that the charge to which the Petitioner had pled nolo contendere was interwoven with the facts of the "passport" case, the District Judge, taking into account the then pending passport conviction and sentence, imposed a sentence of two years probation.

Shortly after the sentencing hearing in the certificates misdemeanor case, the Fifth Circuit reversed the first passport case and remanded for a new trial. At that second trial, the Defendant was again convicted and on August 31, 1981 again appeared for sentencing. At that

hearing, the District Court enhanced WASMAN'S sentence to a straight two years incarceration with the announced basis for the enhancement being his plea of nolo contendere in the misdemeanor case. The transcript of the sentencing hearing is contained in the Appendix.

REASONS FOR GRANTING THE WRIT

ENHANCEMENT OF SENTENCE FOLLOWING RETRIAL AND CONVICTION CANNOT BE BASED UPON CONDUCT OCCURRING BEFORE THE FIRST SENTENCING HEARING

The issue presented for review is simply whether a trial judge may use, as a basis for enhancing a defendant's sentence following re-trial after a first conviction is reversed on appeal, conduct on the part of the defendant which occurred prior to the first sentencing hearing.[2]

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[2] Clearly, it is beyond dispute and in fact was conceded below that the sentence imposed upon the Petitioner following the second trial was an enhanced one over that previously imposed. See United States v. Williams, 651 F.2d 644, 647, (9th Cir. 1981); United States v. Gilliss, 645 F.2d 1269, 1283 (8th Cir. 1981); United States v. Markus, 603 F.2d 409 (2d Cir. 1979).

Any analysis of such an issue must begin with this Court's opinion in the case of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072(1969). In Pearce, it was held that a trial judge is not constitutionally forbidden from imposing a more severe sentence upon a defendant who has successfully attacked a first conviction, but due process requires that vindictiveness against the defendant for exercising his appellate rights must play no part in that enhancement and that a defendant should be free of fear of vindictiveness that may otherwise deter him from taking an appeal. 395 U.S. at 723-725, 89 S.Ct. at 2079-2080. To insure such a result, this Court fashioned a prophylactic rule:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. 395 U.S. at 726, 89 S.Ct. at 2081

In setting out such a rule, this Court was concerned not only that actual vindictiveness play no part in any re-sentencing process but also that a defendant should be able to decide whether to exercise his appellate rights free and unfettered from the apprehension that a trial judge would act with a retaliatory motive at any subsequent sentencing. North Carolina v. Pearce, 395 U.S. at 724-725, 89 S.Ct. at 2080.

In the instant case, the enhanced sentence, imposed for the reasons stated (App., p.A-33-67), clearly violates the Pearce rule. In enhancing the Petitioner's sentence (from a previously imposed six (6) months incarceration to two (2) years incarceration), the trial court looked to the intervening misdemeanor plea of nolo contendere to a charge of possessing false certificates of deposit. That plea was a negotiated one, whereby the Petitioner entered his plea and the Government dismissed a mail fraud indictment involving the same incident. That indictment was pending at the time of the first sentencing hearing in this case ("the passport case") and known to the sentencing judge. The charges in the false certificates case

involved conduct occurring in 1973, over six (6) years prior to the first sentencing hearing and approximately five (5) years prior even to the indictment in the instant case. The only relevant thing that occurred between the two sentencings in the passport case was that the mail fraud case was resolved when the Government dismissed the pending indictment and WASMAN pled nolo contendere to the misdemeanor information filed in its place, a plea given with the announcement that it was made consistent with North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1975), that is, a plea entered as being in the overall best interest of the defendant.

The Petitioner submits that the use of the plea and sentence in the false

certificates case as the basis for enhancement of his sentence in the passport case was unquestionably improper and demands a remand for sentencing before a different judge, a position urged but rejected in the Eleventh Circuit. Both the Second and Ninth Circuits have found enhancement improper under similar circumstances and outside the guidelines set down by this Court in North Carolina v. Pearce, supra. See United States v. Markus, 603 F.2d 409 (2d Cir. 1979) and United States v. Williams, 651 F.2d 644(9th Cir.1981) respectively. In light of the split among the circuits on this important due process issue and the apparent clear violation by the Eleventh Circuit of the Pearce rule in the instant case, the Petitioner urges that this Court grant

the instant petition and review this issue.

Pearce and the logic behind it allows for enhancement based on conduct of the defendant, not on the resolution of that conduct in court. In Pearce, this Court chose to insure that a defendant would have no fear that a trial judge would retaliate against him for successfully bringing an appeal by "putting the ball in his lap." If he did anything improper between the first and second sentencing hearings, then the judge could take that into consideration on re-sentencing. Where, as here, the Petitioner did nothing other than resolve in court a pre-existing factual situation, enhancement based solely for that reason should not be permitted. If enhancement is to take place, it should

be due to actions of the defendant. If he does something new, he should "pay the price." Otherwise, if there is no identifiable conduct occurring after the time of the first sentencing, then things should return to the status quo at the time of the first sentencing.

In Blackledge v. Perry, 417 U.S. 21,28, 94 S.Ct. 2098, 2102(1974) this Court emphasized that fear of vindictiveness must be removed as well as vindictiveness itself. Further, in the recent case of United States v. Goodwin, _____U.S. ____,102 S.Ct. 2485 (1982), it was noted

> Both Pearce and Blackledge involved the defendant's exercise of a procedural right that caused a complete retrial after he had been once tried and convicted. The decisions in these cases reflect a recognition

> by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of stare decisis, res judicata, the law of the case and double jeopardy all are based, at least in part, on that deep-seated bias. While none of those doctrines barred the retrials in Pearce and Blackledge, the same institutional pressure that supports them might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a retrial of a decided question.
>
> 102 S.Ct. at 2490-2491

The concern about these possible subconscious reactions to retrials is another reason for the objective standard of Pearce, that is, to take subconscious motivation out of the picture. Otherwise, if he feels he could receive a harsher sentence without his doing anything more,

there is certainly a realistic likelihood that a defendant may be deterred in exercising his appellate rights, a situation that Pearce was designed to overcome. Blackledge v. Perry, 417 U.S. at 28, 94 S.Ct. at 2102. See also United States v. Monaco, 702 F.2d 860, 884 (11th Cir.1983).

In its opinion affirming the lower court, the Eleventh Circuit noted that there was no evidence that the enhancement given in this case resulted from actual vindictiveness on the part of the sentencing judge. United States, v. Wasman, 700 F.2d 663,668(11th Cir. 1983). Whether a trial judge acts out

of actual vindictiveness[3], or with a motive subconsciously derived from the reversal of the first trial (United States v. Goodwin, supra) ordinarily cannot definitely be determined. Because of this uncertainty, the objective test of Pearce, as followed by the Second Circuit in United States v. Markus, supra, and the Ninth Circuit in United States v. Williams, supra, is required to take fear

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[3] A review of the transcript of the sentencing hear-ng in this case (App. p.A-33-67) reveals strong negative feelings against the Petitioner. The trial judge appears to be displeased with the sentence given by the judge in the misdemeanor false certificates case and was acting essentially as a reviewing body. It is ironic that the enhancement of eighteen (18) months (two years v. six months given the first time) was more than the maximum allowable sentence for the false certificate case itself.

of vindictiveness out of the process altogether.[4]

A major concern of the Eleventh Circuit, both in terms of the facts of this case and as a general proposition, is that the defendant would have an unfair advantage if the trial judge could not consider the intervening misdemeanor conviction as a factor at the second

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[4]In attempting to distinguish Markus and Williams, the Eleventh Circuit noted that those cases did not discuss several more recent cases from this Court e.g., Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977 (1973); Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953 (1972); Moon v. Maryland, 398 U.S. 319, 90 S.Ct. 1730 (1970). But those cases really do not address the issue presented here or in Markus and Williams.

sentencing. At the first sentencing hearing, WASMAN, through counsel, requested that the then pending mail fraud indictment not be considered for sentencing purposes. The district judge announced that it was not his practice to consider pending charges in arriving at a sentence. The Eleventh Circuit, adopting arguments made by the Government and the comments of the district judge, noted that if the false certificate case were again excluded from consideration at the second sentencing, the defendant would "have his cake and eat it,too." United States v. Wasman, 700 F.2d at 670. (App.p-A-31). However, that fear is unwarranted, both on these facts and as a general proposition. In the instant case, WASMAN did not avoid being sentenced

by a court with guilt in both the passport and certificate case considered. Those were precisely the circumstances when he was sentenced in the certificate case. At the time of that sentencing hearing, the first passport conviction was pending on appeal. The district judge specifically acknowledged that conviction, noted that both cases arose from basically the same facts and sentenced WASMAN to two years probation. Thus, a United States District Judge imposed a sentence fully aware of both convictions and fully able to consider both in arriving at an appropriate sentence. Perhaps the judge in the instant (passport) case did not like the sentence imposed in the certificates case, but to permit the enhancement as occurred herein results

in an improper pyramiding of sentences.

As a general proposition, the Eleventh Circuit noted that to adopt the Markus (Second Circuit) and Williams (Ninth) approach to Pearce would have "two possible consequences, neither likely to be of service to the governing constitutional considerations in Pearce. United States v. Wasman, 700 F.2d at 669 (App. p.p.-A-28-29). The first consequence would be, according to the Eleventh Circuit, for a sentencing judge to consider a charge merely pending at the time of the first sentence. Second, if the judge did not consider a pending charge then the defendant would receive, according to the Eleventh Circuit,"total immunization of the predating offense from consideration at any time." 700 F.2d at 669 (App.p.A-29).

However, the Circuit Court overlooks the fact that the predating[5] pending charge will be resolved at some time. If the defendant is subsequently convicted of that charge, he will come before a judge for sentencing. When he does, the judge will be able to consider both the case before him and the prior conviction in arriving at an appropriate sentence (as the judge in the false certificates case did here when he considered the first passport conviction). If the defendant is found not guilty of the predating offenses, then clearly that offense should not be considered by another judge in another case as an aggravating circumstance for sentencing. Thus, the defendant will not be immunized if a judge does not consider pending

[5]By "predating", it is meant the charge based on conduct occurring prior to the first sentencing hearing.

charges, even if he will be precluded from considering an ensuing conviction should his case be reversed on appeal and a second sentencing be required.

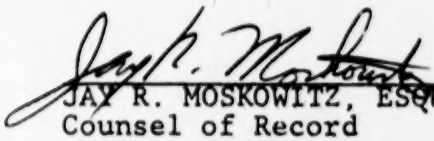
This Court has said that a trial judge is not constitutionally precluded, in re-sentencing, from considering events subsequent to the first trial that may throw new light upon a defendant. North Carolina v. Pearce, 395 U.S. at 723, 89 S.Ct. at 2079.

Though the intervening conviction may shed new light on the defendant, the chilling effect upon the defendant's decision-making as to whether to exercise his appellate rights demands that prior conduct not be considered on re-sentencing. To hold otherwise would result in an improper pyramiding of sentences as well as instill fear of vindictiveness in the defendant.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August 1983, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, Department of Justice, Washington, D.C. 20530 and to Patty Merkamp Stemler, Esquire, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C. 20530.

JAY R. MOSKOWITZ, ESQUIRE

A P P E N D I X

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Milton R. WASMAN,
Defendant-Appellant.

No. 81-5886.

United States Court of Appeals,
Eleventh Circuit.
March 17, 1983.

Following remand, 641 F.2d 326, defendant was convicted before the United States District Court for the Southern District of Florida. Norman C. Roettger, Jr., J., of making false statements in a passport application, and he appealed. The Court of Appeals, Markey, Chief Judge of the Federal Circuit, sitting by designation, held that: (1) defendant's efforts to show kidnapping and theft of his driver's license following making of the false statement was properly excluded as

irrelevant; (2) error, if any, in refusing to allow direct quotation of advice that defendant assume a non-Semitic name in his dealings with Arabs was harmless; and (3) where on first sentencing the judge disregarded then-pending charge but that charge resulted in conviction following first trial, there was no due process violation in considering that conviction in imposing enhanced sentence following retrial.

Affirmed.

Jay R. Moskowitz, Sands & Moskowitz, Miami, Fla, for defendant-appellant.

Patty Merkamp Stemler, Appellate Sect., Crim. Div., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District

of Florida.

Before FAY and CLARK, Circuit Judges, and MARKEY*, Chief Judge.

MARKEY, Chief Judge:

Milton R. Wasman (Wasman) appeals his conviction by a jury in the United States District Court for the Southern District of Florida of knowingly and willfully making false statements in a passport application in violation of 18 U.S.C. §1542.[1]

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[1] 18 U.S.C. § 1542 provides:

False statement in application and use of passport

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way be reason of any false statement- Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

He asserts procedural errors, judicial bias, and a sentence enhancement violative of due process.

We affirm.

Background

At a first trial in September 1979, the government showed that in March 1978 Wasman applied for and obtained a passport in the name of his deceased law school classmate, David Hendrick. Wasman did not dispute that showing,but attempted to introduce evidence that his purpose was to employ a non-Semitic name in business dealings with Arab investors.[2]

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[2] The government also showed that other entries on the application were false (date and place of birth, marital status, etc.). Wasman does not dispute the falsity of those entries, but attempts to excuse them as designed to achieve the same mislead-the-Arabs purpose.

The district court excluded that evidence as irrelevant. The jury convicted and Wasman was sentenced to two years incarceration, six months to be spent in confinement, the balance suspended in favor of three years probation.

Wasman appealed, urging that he had legally assumed the name "Hendrick," and asserting error in the refusal to admit evidence of his purpose. Holding that evidence admissible as indicative of circumstances surrounding Wasman's assumed-name defense, the court reversed and remanded for a new trial. United States v. Wasman, 641 F.2d 326 (5th Cir. 1981).

At the second trial and to show that Wasman had not assumed a new name but had continued to use "Wasman", the government showed that in May 1978 he applied as "Wasman" for a duplicate driver's license, stating on the

application that the original had been stolen.

Wasman testified that in February 1978 he met in London with Ronnie Comninos and Andrew Connolly, who allegedly represented Arabs interested in Florida real estate, and who advised him to secure identification under a non-Semitic name. The court excluded testimony directly quoting that advice as hearsay, but permitted testimony on the general nature of the discussions.

Wasman also sought to show that Comninos and Connolly kidnapped him in Spain in March 1978; that they stole his driver's license and the "Hendrick" passport; and that he had traveled back to the United States under his "Wasman" passport. The district court excluded that evidence as irrelevant.

Wasman was again convicted of

violating 18 U.S.C. § 1542 and was sentenced to two years confinement. The court explained that it was enhancing the sentence in view of Wasman's interim conviction on a plea of nolo contendere to a charge of possession of conterfeit certificates of deposit.

Issues

(1) Whether it was error to exclude: (a) evidence of kidnapping; (b) testimony quoting advice of Comninos and Connolly. (2) Whether the trial court was biased against Wasman. (3) Whether the sentence enhancement violated Wasman's due process rights.

OPINION

(1) Exclusion of Evidence

(a) Kidnapping.

(1) Judge Roettger properly rejected as irrelevant Wasman's effort to show kidnapping and theft of his driver's license by Comninos and Connolly in Spain. Proof of those facts, if facts they be, would bear no relation to the charge of making false statements in an earlier passport application.[3]

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[3]Beyond the inherent irrelevance of the allegations, their proffer appears disingenuous in light of Wasman's having filed his false passport application before the date on which the license and the false passport were allegedly stolen.

Wasman says he "had a right to show the jury that he was telling the truth when he stated in his application for a duplicate license that the original had been stolen." The veracity of that statement, however, was never challenged. Thus Wasman's assertion that failure to admit evidence of a truthful application would leave the jury with an impression that he was prone to mislead when applying for various forms of identification is speculative and unfounded.

(b) Advice of Comninos and Connolly

(2) Relying on U.S. v. Herrera, 600 F.2d 502 (5th Cir. 1979), Wasman says testimony precisely quoting Comninos' and Connolly's advice was offered not to prove the truth of the matter asserted but to show his state of mind, and on that basis the testimony

should have been admitted. Appellant in Herrera, however, asserted a coercion defense to which the exact language of certain threats was critical. Connolly's and Comnino's exact statements are not critical here, where Wasman asserts neither threat nor coercion.

If there were error in refusing to allow direct quotation, it must be viewed as harmless. Wasman was permitted to paraphrase in detail his conversations with Comninos and Connolly, and to convey to the jury his alleged motivation in entering a false name on his passport application.

(2) Bias

Wasman says the trial judge made comments reflecting bias against him and entitling him to a new trial

before a different judge. The assertion is without merit.

(3) Wasman cites as indicative of bias the same evidentiary rulings he challenged on their merits. As indicated above, however, those rulings were correct and harmless. Without more, a judge cannot be charged with bias for having made evidentiary rulings. Nor, as set forth below, was the enhanced sentence indicative of bias, prejudice, or vindictiveness.

Judge Roettger's post-verdict comments to the jury concerning the background (i.e., the first trial and appeal) of the case and the evidentiary questions involved, did not in the slightest reflect personal bias or animosity toward Wasman. Significantly, Wasman cites no pre-

verdict statement to the jurors that would or might have influenced their impartiality.

There is on this record no basis whatsoever for inferring bias or prejudice of any kind against Wasman.

(3) Sentence Enhancement

The fact pattern out of which this issue rises is one of first impression in this circuit.

Wasman says enhancement of his sentence violated his right to due process, citing North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed 2d 656 (1969). In Pearce the Court said a judge may enhance the sentence of a reconvicted defendant who had successfully attacked a first conviction, but went on to state a

constitutional limitation on that authority: "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Id., at 725, 89 S.Ct., at 2080. Thereafter, "to assure the absence of such a motivation," the Court fashioned a procedural guideline:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.

Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id., at 726, 89 S.Ct. at 2081.

In Pearce, the constitutional considerations of concern had their genesis not only in the possibility of judicial vindictiveness, but in the possibility of a prohibiting perception on the part of those convicted, i.e., that a successful appeal might itself be the cause for sentence enhancement on re-conviction. 395 U.S. at 724,725, 89 S.Ct. at 2080. Having identified vindictiveness and its inhibiting potential

as phenomena to be avoided, the Court elected to supply the quoted guidelines as a means to that end.[4]

[4] Judge Roettger followed precisely the procedural steps of Pearce, affirmatively stating on the record his reason for enhancing the sentence, basing that reason on objective information concerning identifiable conduct of the defendant, and making the factual data on which his action was based part of the record so that its constitutional legitimacy may be fully reviewed on appeal:

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[4]Prompting Justice Black to say, at 395 U.S. 740, 741, 89 S.Ct. 2083: Of course nothing in the Due Process Clause grants this Court any such power as it is using here. Punishment based on the impermissible motivation described by the Court is, as I have said, clearly unconstitutional, and courts must of course set aside the punishment if they find,

by the normal judicial process of fact-finding, that such a motivation exists. But, beyond this, the courts are not vested with any general power to prescribe particular devices: [i]n order to assure the absence of such a motivation." Numerous different mechanism could be thought of, any one of which would serve this function. Yet the Court does not explain why the particular detailed procedure spelled out in this case is constitutionally required, while other remedial devices are not. This is pure legislation if there ever was legislation. (Emphasis in original)

and at 395 U.S. 742, 89 S.Ct. 2084:

The danger of improper motivation is of course ever present. A judge might impose a specially severe penalty solely because of a defendant's race, religion, or political views. He might impose a specially severe penalty because a defendant exercised his right to counsel, or insisted on a trial by jury, or even because the defendant refused to admit his guilt and insisted on any particular kind of trial. In all these instances any additional punishment would of course be, for the reasons I have stated, flagrantly unconstitutional. But it has never previously been suggested by this Court that "[i]n order to assure the absence of such a motivation," this Court could, as a matter of constitutional law, direct all trial judges to spell out in detail their reasons for setting a particular sentence, making their reasons "affirmatively

appear," and basing these reasons on "objective information concerning identifiable conduct". Nor has this Court ever previously suggested in connection with sentencing that "the factual data...must be made part of the record." On the contrary, we spell out in some detail in Williams v. New York, 337 U.S. 241 [69 S.Ct. 1079, 93 L.Ed. 1337] (1949), our reasons for refusing to subject the sentencing process to any such limitations, and the Court has, until today, continued to reaffirm that decision. See, e.g., Specht v. Patterson, 386 U.S. 605 [87 S.Ct. 1209, 18 L.Ed. 2d 326] (1967). (Emphasis in original)

THE COURT: I would like to have you address particularly the fact that there's been an intervening conviction between the first trial and the second trial. And I do think that is a matter that the Court should take into consideration in determining sentence to be imposed at this time. And I would like to have you address that. And that, of course, is a matter that was before Judge Davis' -

MR. MOSKOWITZ: Be happy to.

THE COURT: - Presentence Report.

* * * * * * *

THE COURT: However, I make it always very clear that I do not consider pending charges in considering what sentence I impose. Therefore, when I imposed sentence the first time, the only conviction on Mr. Wasman's record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I do not consider then and I don't in other

cases either, pending matters because that would result in a pyramiding of sentences. At this time he comes before me with two convictions. Last time, he came before me with one conviction. Because Wasman's interim conviction was for an offense committed before his first trial, he focuses on the phrase "conduct ...occurring after the time of the original sentencing" in Pearce, saying it prohibits consideration of that offense as a basis for sentence enhancement.

Wasman's argument concerns but a part of the means, and ignores the end sought to be achieved in Pearce. It exalts words above substance. For those reasons, the argument is not persuasive. Moreover, a rigid limitation of increased sentences to those based on misconduct occurring after the first sentencing would needlessly erase relevant information from the sentencing slate, while

contributing nothing to the goal of avoiding vindictiveness. An intervening conviction adds a new dimension to the data before a sentencing judge who had disregarded charges merely pending at the time of an earlier sentencing hearing. When, as here, the effect of an intervening conviction is to convert what had been considered a legal nullity for sentencing purposes, i.e., a mere accusation, into a fact fully relevant to sentencing, i.e., that defendant had committed an additional crime, a sentence enhancement based on that additional conviction does not impede the goals outlined in Pearce.[5]

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[5]Though 18 U.S.C. §3577 provides that "No limitation shall be placed on the information...a court...may...consider..." in sentencing, a strong rationale supports Judge Roettger's stated practice of ignoring pending charges. Beyond his concern for "pyramiding" sentences, a mere accusation does not establish that the charged conduct was that of the defendant. If our "innocent till proven

guilty" jurisprudence means anything, it must mean that punishment may not be meted out for conduct not established as that of the defendant.
We need not, and therefore do not, here decide whether unproven charges must be invisible on a defendant's legal slate at sentencing. Whether consideration of a mere accusation in setting a sentence would accord with due process must await determination in a case squarely presenting the issue.

[5] The thrust of Pearce is that increased punishment after appeal and reconviction violates a defendant's due process rights when it results from judicial vindictiveness. In setting forth its guidelines the Court's express objective was to assure absence of such retaliatory motivation. Reading the Court's Pearce opinion in its entirety and in light of the facts of that case, as we must, Armour & Co. v. Wantock, 323 U.S. 126, 132, 133, 65 S.Ct. 165, 168, 169, 89 L.Ed. 118 (1944), convinces us that increased sentences are not thereby limited to instances in which a defendant has committed an offense after the first trial.[6]

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[6] In Pearce, the involved States offered no reason for increasing the sentences of Rice or Pearce. 395 U.S. at 726, 89 S.Ct. at 2081. The court had no occasion therefore to consider the propriety of basing an increased sentence on an intervening conviction for an offense committed before a first sentencing.

Further, the majority opinion in Pearce contains language in direct conflict with Wasman's position. In dealing with an Equal Protection argument, the Court said, "A man who is retried after his first conviction has been set aside may be acquitted. If convicted, he may receive a shorter sentence, he may receive the same sentence, or he may receive a longer sentence than the one originally imposed. The result may depend upon a particular combination of infinite variables peculiar to each individual trial." 395 U.S. at 722, 89 S.Ct. at 2079. At another point, the court quoted with approval from Williams v. New York, 337 U.S. 241, 245, 69 S.Ct. 1079, 1082, 93 L.Ed. 1337 (1949), saying "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities". 395 U.S. at 723, 89 S.Ct. at 2079. (Emphasis added). A conviction is, of course, an "event". Though immediately thereafter and in its guidelines the Court referred respectively to defendant's conduct "subsequent to the first conviction" and "occurring after the first sentencing," it would appear that those phrases rested on an assumption that all conduct occurring before the first conviction and sentencing had been considered or somehow merged in setting the first sentence. The assumption is inapplicable where, as here, the earlier conduct was ignored until it became legally attributable to the defendant.

The target in Pearce was vindictive sentencing, not defendant misbehavior between trials. No reason exists for applying a phrase in the Pearce guidelines to circumstances bearing no relation to the purpose of those guidelines. There is on this record no evidence whatsoever that the enhancement here resulted from vindictiveness of Judge Roettger. Nor does Wasman argue that it did. In such circumstances, an increased sentence neither thwarts the purpose of Pearce and its guidelines nor offends constitutional due process considerations.

The view here expressed is consonant with the Supreme Court's treatment of Pearce as unequivocally directed to and only to the hazard of vindictiveness. In Moon v. Maryland, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed.2d 262 (1970), the Court dismissed a writ of certiorari as

improvidently granted because Moon did not allege that his increased sentence was motivated by vindictiveness. Id. at 320, 90 S.Ct. at 1730-31. In Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), the Court explained that Pearce did not bar an increased sentence after a de novo trial because the "possibility of vindictiveness, found to exist in Pearce, is not inherent in the Kentucky two-tier system." Id.at 116, 92 S.Ct. at 1960. In Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1972), in the course of considering whether imposition of an increased sentence by a jury upon a retrial violates due process, the Court said:

[Pearce] was premised on the apparent need to guard against vindictiveness in the resentencing process. Pearce was not written with a view to protecting

against the mere possibility that,once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process. The possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process. [Emphasis in original]

Id., at 25, 93 S.Ct., at 1982

[6] In sum, "[t]he lesson that emerges from Pearce, [Moon], Colten and Chaffin is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness'". Blacklege v. Perry, 417 U.S. 21, 27, 94 S.Ct. 2098, 2102, 40 L.Ed.2d 628 (1974).

Thus the post-Pearce guidance supplied by the Court makes clear that where, as here, the record establishes a total

absence of any "realistic likelihood" of vindictiveness, an increased sentence does not offend the Due Process Clause.

Wasman cites United States v. Markus, 603 F.2d 409 (2d Cir.1979) and United States v. Williams, 651 F.2d 644 (9th Cir.1981). In Markus, the court said, "[i]ntervening convictions... based on indictments pending at the time of the original sentencing...and upon conduct predating that sentencing, cannot satisfy Pearce's exacting requirement". 603 F.2d at 414. The Ninth Circuit's view expressed in Williams is substantially identical to that expressed in Markus.[7]

[7] In Williams, the indictment on which the intervening conviction was based occurred after the original sentencing.

[7] The later Supreme Court opinions explaining Pearce were not discussed in either Markus or Williams. We decline to adopt the approach taken by our sister circuits in Markus and Williams because, in our view, that approach separates a suggested procedure for avoiding a result from the result sought to be avoided. It grants an independent status to the words "conduct...occurring after...", while disregarding their relationship, if any, to the avoidance of vindictiveness. Adoption of that approach, moreover, would have only two possible consequences, neither likely to be of service to the governing constitutional considerations in Pearce. One consequence would be a requirement that an offense merely charged at the time of first sentencing be considered in setting that first sentence. The alternative would be

total immunization of the predating offense from consideration at any time. We think the better course lies in recognizing that when offenses the subject of charges then merely pending are totally disregarded at original sentencing, those offenses may be considered on the record at second sentencing when convictions on those offenses have occurred in the interim. Nothing in that course would appear to us to impede, even peripherally, the thrust of Pearce, i.e., avoidance of sentence enhancement based on vindictiveness, real or apparent, for success on appeal.[8]

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[8] Wasman points to Justice White's one-sentence concurrence in Pearce, 395 U.S. at 751, 89 S.Ct. at 2089, in which he suggested that an increased sentence should be baseable on "any objective, identifiable, factual data not known to the trial judge" at original sentencing, and to the Ninth Circuit's thought, expressed in Williams, that Justice White would have had no cause to write separately if Pearce would permit an increase based on an intervening conviction. None of the five opinions filed in Pearce discussed the present

fact pattern, nor is there indication that its ramifications were specifically considered by any of the five writers. We are content to rest our decision therefore on the practicalities of the actual events reflected in the present record, declining surmise respecting what might have been the thought processes of individual Justices if the record in Pearce had corresponded to that now before us.

The desire to have and simultaneously eat one's cake is understandable; but catering in the courtroom to that desire can produce only annoying anomalies in the law. This case is illustrative. Wasman specifically requested at his first sentencing hearing that the offense for which a charge was then pending be disregarded because he had not had an opportunity to disprove the charge. Judge Roettger, in accord with his announced practice, granted that request. Now, after conviction for that same offense, Wasman again says it should continue to be disregarded, this time because the critical date should be that of the offense. As indicated above, the argument is unavailing.

In all of the circumstances, we hold that Wasman's increased sentence was in this case proper, that it was based on objective, factual new evidence

not previously considered, that it was neither motivated by judicial vindictiveness nor reasonably perceivable as having been so motivated, and that it did not therefore infringe Wasman's right to due process.

Conclusion

No error occurred in refusing the evidence of kidnapping and quotation of Comninos and Connally. Nothing of record remotely indicates bias or prejudice against Wasman. The enhancement of Wasman's sentence in view of his intervening conviction was not violative of Wasman's due process rights. Accordingly, we affirm.

The conviction is AFFIRMED.

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 78-253-Cr-NCR

UNITED STATES OF AMERICA

vs.

MILTON R. WASMAN

_____/

United States District Court
299 East Broward Boulevard
Fort Lauderdale, Florida
August 31, 1981

The above-entitled matter came on for sentencing before the Honorable NORMAN C. ROETTGER, JR., United States District Judge, pursuant to Notice, commencing at 1:30 p.m.

APPEARANCES:

JEFFREY H. KAY, ESQUIRE
Assistant United States Attorney
On behalf of the Government

JAY MOSKOWITZ, ESQUIRE
On behalf of the Defendant

THE COURT: Madam Clerk, please call the case for sentencing.

MS. JACOBS: United States of America versus Milton Wasman.

MR. MOSKOWITZ: Afternoon, Your Honor. Jay Moskowitz, on behalf of Mr. Wasman. Mr. Wasman is here.

THE COURT: Mr. Moskowitz, I have reviewed the new Presentence Report in connection with the matter before Judge Davis which was prepared January of this year and also the addendum to it, dated August 27, 1981, entitled, An Update to Presentence Investigation on Mr. Wasman, and, of course, I have heard the evidence in the case twice.

Have you had a chance to go over the new Presentence Report in this matter?

MR. MOSKOWITZ: Yes, I have.

THE COURT: Has your client had a chance to go over it?

MR. MOSKOWITZ: Yes, he has.

For the record, if Your Honor recalls, Mr. James Russ was the trial counsel in this particular case before Your Honor. Mr. Wasman would like to go forward today. I am here instead of Mr. Russ. And I just want to make that clear for the record before we even start that it's Mr. Wasman's desire that I be here today and that we go forward today.

THE COURT: Is that your wish and intention that Mr. Moskowitz represent you at this time?

DEFENDANT WASMAN: Yes, sir. We have discussed it with Mr. Russ so that he is aware of it and he is relieved of any responsibility of being here today.

THE COURT: Very well.

Please proceed then with allocution. But, first, are there any additions or corrections to be made to the Presentence Report?

MR. MOSKOWITZ: There are just two, Your Honor.

I represented Mr. Wasman in the case before Judge Davis and was intimately involved in preparing our input into the PSI in that particular case and reviewed it both in January when that case was called for sentencing and last week, again, in the probation office in Miami.

There is just one thing, an oversight that was neglected to be corrected in that PSI, and that had to do with Mr. Wasman's net worth. Since the time of the PSI preparation, back in January, his net worth has decreased because of various legal problems and other matters by approximately $43,000, which would be accurate to reflect now in the update as a change. I told Mr. Schwartz that at the time it had been typed, the update. I told him that I would present that to

you today.

There are a few things I'd like to say.

THE COURT: Very well.

MR. MOSKOWITZ: First off, I am not going to say much about the facts of the case. All of that has been said before. As Your Honor said, you sat through the trial of this case twice and are very familiar with the facts of the case. We also included in our presentation which was incorporated in the PSI update the Defendant's version of the facts. Very briefly, Mr. Wasman just admits that he went to the Passport Office that day back in 1978 and obtained a passport in the name of David Hendrick, but as Your Honor is aware, both in the testimony at the last trial and also in our input into the PSI, the reasons for that which I don't think I have to waste the Court's time now going over again, it's in the update.

What I would like to talk about for a few minutes is Milton Wasman, himself.

THE COURT: Very well.

MR. MOSKOWITZ: Particularly those things in his life that have changed since the last time he was sentenced before Your Honor.

THE COURT: I would like to have you address particularly the fact that there's been an intervening conviction between the first trial and the second trial. And I do think that is a matter that the Court should take into consideration in determining sentence to be imposed at this time. And I would like to have you address that. And that, of course, is a matter that was before Judge Davis'--

MR. MOSKOWITZ: Be happy to.

THE COURT: --Presentence Report.

MR. MOSKOWITZ: I'd be more than happy to, Your Honor.

THE COURT: Very well.

MR. MOSKOWITZ: First off, in that case, Mr. Wasman was indicted sometime, I think it was previous to the Indictment in this particular case, four counts of mail fraud. Based on negotiations with the U.S. Attorney's Office and the U.S. Attorney dismissed that particular case and filed a one-count misdemeanor Information of possession of false bank certificates of deposit to which Mr. Wasman entered a plea of nolo contendere, basically telling Judge Davis at the time of the plea which was last October that the case had been around for a long period of time, and due to his health problems--You may be aware Mr. Wasman had a stroke a couple years ago, has had numerous other health problems. Also, he wanted to get this case behind him. Although he did not admit his guilt in that case under Alford versus North Carolina, he did enter a plea saying it

was in his best interests to dispose of the case. Judge Davis accepted the nolo plea, also under the Alford guidelines, and ordered a PSI.

In January of this year, Mr. Wasman was sentenced. We submitted a lengthy input to the PSI before Judge Davis. I'm not sure if it was all included in the package that Your Honor received but--

THE COURT: I received a letter with the PSI Judge Davis had, apparently.

MR. MOSKOWITZ: They were all attached to the PSI. I believe there were some 100 pages at that time. It basically outlined what Mr. Wasman's defense would be had he gone to trial in the then mail fraud case. After an hour-and-a-half sentencing hearing before Judge Davis, His Honor imposed a sentence of two years' probation on Mr. Wasman in that particular

case, misdemeanor, possession of false certificates of deposit case. That basically is the case before Judge Davis.

I noted in the update version of the PSI in this particular case that the Government attorney, David Hammer, said that the plea in that particular case should be considered by Your Honor and should give grounds for perhaps increasing the sentence over what Your Honor gave Mr. Wasman last time around, and I would most heartily object to that. I think that that would be improper under the law.

The indictment in that particular case, the mail fraud case, was brought before the Indictment in this case, and even though something took place after the first sentence in this case, that is, the sentence by Judge Davis, that does not come under the guidelines set forth by the Supreme Court in North

Carolina versus Pearce--

THE COURT: However, I make it always very clear that I do not consider pending charges in considering what sentence I impose. Therefore, when I imposed sentence the first time, the only conviction on Mr. Wasman's record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I did not consider then and I don't in other cases either, pending matters because that would result in a pyramiding of sentences. At this time he comes before me with two convictions. Last time, he came before me with one conviction.

MR. MOSKOWITZ: Well, Your Honor, if I could read from a portion of North Carolina versus Pearce which is at 89 Sup. Ct. 2072. The portion I am going to be reading is from 2081: "In order to

assure the absence of such a motivation," that is motivation to penalize a man for going through trial or from taking an appellate right--"we have concluded that whenever a Judge imposes a more severe sentence upon a Defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the Defendant occurring after the time of the original sentencing proceedings."

The operative word here is "conduct," and the conduct being not--what I'm arguing, the conduct not being the plea but the actual conduct that took place. The conduct--

THE COURT: Well, let me tell you, Mr. Moskowitz. I understand what you're saying but I'm telling you how I considered it the first time. I'm telling

you how it appears this time. Then there was one conviction. Now, there are two convictions. Now, because it so happened that the events he was charged with occurred before should not be considered in a situation like this, then you're suggesting to the Court that, Well, don't worry about pyramiding sentences, Judge, consider those pending matters and future things because we might take an appeal and then in a subsequent trial if he were found guilty and there was a resentencing in this case, then I'm going to assert that Pearce would preclude your considering it even though the conviction in the other matter had occurred afterwards. That is a beautiful example of blowing hot and blowing cold, riding the horse both ways and eating your cake--or a million other metaphors we could come up with.

MR. MOSKOWITZ: Two comments I would like to make.

THE COURT: I would like to hear your response to that. I have always been very candid about setting forth my sentencing objectives and sentencing considerations. I try not to make a secret about it at all.

MR. MOSKOWITZ: Two things I'd like to say. First thing is really I'm not suggesting a more harsh sentence, you know, penalize Mr. Wasman for going to trial. Had an appeal not been taken in this case which the Fifth Circuit deemed meritorious enough to sent it back for a new trial this case would have been long gone before the nolo contendere plea before Judge Davis in the other case.

THE COURT: Not so. I sentenced him to two years confinement, suspended six months, that he would have done six months confinement under the split sentence provision and upon release, upon dis-

charge from incarceration, the Defendant shall be placed on probation for a period of three years. Sentence was imposed October, 1979. If he had been remanded on the day of sentencing he would have done six months confinement and then three years probation.

MR. MOSKOWITZ: Maybe I didn't make myself clear. Been long gone before the sentencing procedure before Your Honor. I said you would have sentenced him, I believe it was, some five or six--it was over a year before the Judge Davis matter took effect or y ear-and-a-half, I think it was. You sentenced him, I think it was, in late '79, first time around on this case. The Judge Davis plea was in October of '80. So that the matter was long gone from Your Honor for sentencing purposes.

THE COURT: How about revocation of probation purposes?

MR. MOSKOWITZ: Revocation of probation? We are talking about conduct that took place in the probation period. The conduct in the Judge Davis case took place back in 1975 through '76, '77.

THE COURT: Here, again, you are trying to preclude me from considering pending matters on the one hand and then preclude me from considering subsequent conviction on the other.

MR. MOSKOWITZ: The Second Circuit was faced with almost the same fact situation in the case of United States versus Markus, 603 F.2d, 409. The Second Circuit ended up saying-- In that case, there were two Indictments. One Indictment, the fact situation is kind of just about the same but there was a second Indictment. Then there was a plea to both cases at the same time. Then one case was taken up on appeal and a problem with the plea session. The Second Circuit reversed.

It came down for a secondary plea and resentencing and the Judge wanted to give the Defendant--did give the Defendant more time than he gave him the first time around, and the Second Circuit in the Markus case said that the Judge could not do that under the Pearce guidelines.

At 414 of the opinion the Court said "Such an increase in the punishment is not per se invalid. But it must be based on 'objective information concerning identifiable conduct on the part of the Defendant occurring after the time of the original sentencing proceeding.'" That's a quote from North Carolina versus Pearce. "No such conduct exists in this case. Intervening convictions of appellants, based upon Indictments pending at the time of the original sentencing by Judge Werker and upon conduct predating that sentencing cannot satisfy Pearce's exacting requirement."

So I believe that based upon Pearce, based upon Markus and based upon the ideology behind Pearce that any enhancement in sentencing would not be appropriate in this case.

THE COURT: Please proceed.

MR. MOSKOWITZ: As I started to say before, a lot of things have changed in Mr. Wasman's life since the last time he stood before Your Honor. At about the time of the first conviction in this case, he was suspended from practice by the Florida Bar. With the exception of a few cases that he had pending at the time of that conviction, needless to say, based on that, his whole lifestyle changed. His wife of about forty years had to go out and get a job for the first time to really support them. He took a position, non-legal position, worked part-time and then full-time for some period of time. And then as I mentioned to Your Honor when I first

started, it changed circumstances considerably, having to go into his assets to support his wife and himself for the last couple of years. I realize that he has been before this Court before but his life has not been easy through the last couple of years. He has suffered considerably. And I believe that this type of a case with exactly what he was charged with and based upon Mr. Wasman himself, that a lesser sentencing than Your Honor handed down the last time would be appropriate.

The only other thing that I would like to add is that in the input to the update to the PSI that was presented to Your Honor a couple of days ago by Mr. Schwartz, probation officer, there was another comment by Mr. Hammer that Mr. Wasman is believed involved, I think it said, in numerous frauds around the State. I'd ask that particular comment

be striken, not considered just for the record. I know Your Honor won't but if they want Your Honor to consider other frauds let them prove the other frauds. You just can't make that statement in a PSI, and I ask that that be striken.

THE COURT: I certainly won't consider it.

MR. MOSKOWITZ: That's basically what I had to say at this time.

THE COURT: Very well.

Anything from the Government?

Mr. Kay?

MR. KAY: Your Honor, I am standing in for Mr. Hammer who had to return to Miami for a court appearance down there. Not being that familiar with the case, and being aware of the Markus case in the Second Circuit, I still believe that the Court probably, Your Honor, could be able to resentence any way the Court deems fit to. If it wants to enhance the penalty

of the prior case, the Court can be allowed to do it. I don't think Markus or Pearce talks about that provision. I think the Court can resentence within the Court's discretion as to any penalty it wishes to give at this point in time.

THE COURT: Mr. Wasman, you may say anything you like in your own behalf, anything at all in mitigation of punishment, sir.

DEFENDANT WASMAN: I don't think there is anything I could add, Your Honor.

THE COURT: Very well.

As everybody who appears in this courtroom knows where probation is involved or a split sentence with a probationary period, I think I made it very clear that, one, I don't consider pending prosecutions and, two, the Court does not take violations of probation lightly. Almost always, the sentencing which results in probation or a probationary

period under a split sentence contains the admonition from me that they discuss the matter with their probation officer and with their lawyer and they will find that I consider violation of probation a serious matter which will almost inevitably, almost inevitably, that is, result in their serving the original term of imprisonment imposed. It's also why I very seldom withhold adjudication of confinement but always give a sentence and then suspend it and impose probation if I'm going to impose a probationary period. I want a Defendant to know what they're facing. I think that's just honest. It may be a sufficient motivation for them to avoid any problem.

Now the argument made by Mr. Moskowitz about the interpretation of Pearce and his reliance on the Second Circuit's opinion I think results if it

were adopted by any other circuit in a situation as this would result in the unfortunate situation of a sentencing Judge considering pending matters while a Defendant before him for a sentencing still enjoyed the presumption of innocence in those pending matters. It would give the Defendant an absurd advantage of being able to appeal a conviction, Case A, and because Case B stemmed from charges which predated the sentencing in Case A but the matter had not been resolved to the point of conviction or acquittal, would then enable him after being sentenced in Case A to negotiate the best situation possible in Case B, then if the appeal in Case A resulted in a remand and a new trial and a conviction again, then asserting, Judge, you aren't allowed, of course, to consider

or we are glad you didn't consider anything in pending Case B at the time you sentenced us originally in Case A but you now can't consider the matter either at the resentence for the second conviction under Case A. As I indicated earlier, that is an absurd advantage that a criminal Defendant would have in those situations. The only way a trial judge could protect the interests of society in such situations would be to depart from the better practice, I think, of not considering pending prosecutions and cranking them into the Judge's determinations even if it resulted in a pyramiding of sentences, however unintended, for that particular Defendant. If that is the interpretation of the Second Circuit, then I question its logic and its merit and I would hope the Fifth Circuit would not also adopt such an absurd anomaly in the law by merely

rubber-stamping the Second Circuit's approach.

Also, as I indicated, I would and do issue a revocation of probation warrant any time there is a subsequent conviction after I have imposed a probationary sentence. At that hearing, I then give Defendants an opportunity after they have been found to have violated probation, an opportunity to show why the original sentence should not be reinstated. And had this conviction come up and Mr. Wasman not taken an appeal, I assure you I would have signed a warrant for revocation of probation and we would have had a hearing and I assume you would have been making the same argument, Mr. Moskowitz. I can assure you, I would have revoked the probation and sentenced him to complete the remainder of his two-year sentence originally imposed, given those assumpt-

ions.

Mr. Wasman is a lawyer Yet, he stands before the Court having failed to report $61,000 in income taxes one year or income--

MR. MOSKOWITZ: To what are you referring, Your Honor?

THE COURT:--and for that he was adjudicated guilty of failure to file for the year, 1968, and he received 18 months' probation by Judge Scott in Jacksonville. Then, in this case--

MR. MOSKOWITZ: That was a failure to file case, Your Honor.

THE COURT: Pardon?

MR. MOSKOWITZ: That was what I said, failure to file. If I didn't, I'm sorry, but it was clearly a failure to file.

THE COURT: And then, since then there have been two other matters in connection with Mr. Wasman. One where

he uses the name of a dead classmate, this case, to get a false passport, and the other one, the case where he pled guilty before Judge Davis, where they induced European investors apparently to part with better than a half-million dollars on land investments in Florida and they were secured by certificates of deposit in a non-existent bank. It sounds like echos of the Bank of Sark, with which we are all familiar, in Broward County.

MR. MOSKOWITZ: As I said, he pled to false certificates of deposit.

THE COURT: Certificates on an entity called Central National Trust, Inc. of Panama, only it didn't exist.

At the time of the first sentencing, I just thought that Mr. Wasman was one of those people who couldn't see the out-of-bounds lines very clearly and didn't care too much which side of it he was on. This Presentence Report gives

me information about this other matter that's hardly an innocous--if that's not a travesty of word--than situations such as failure to file your tax returns or making various false statements in application for passport. Considerably different situation.

MR. MOSKOWITZ: Which PSI are you referring to, Your Honor?

THE COURT: It's dated June 13, 1981.

MR. MOSKOWITZ: The one to Judge Davis?

THE COURT: Yes, sir.

Therefore, I shall impose the original sentence of confinement. It is adjudged the Defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years or until otherwise discharged by due process of law. I think I have satisfied

the requirements of Pearce, spelled out my reasons. I think I have also satisfied the Fifth Circuit's requirements and advised at the beginning of this matter that I wished you to comment on the matter that was before, where he was eventually sentenced by Judge Davis, and you have been given an adequate opportunity to rebut or augment that data.

MR. MOSKOWITZ: Just one question for the record. Do you have before you the various attachments in the Judge Davis matter to the PSI?

THE COURT: No, sir, I did not.

MR. MOSKOWITZ: They were incorporated by reference in the original PSI, which basically explained just about the entire case. We had about an hour-and-a-half hearing before Judge Davis that day in which he asked numerous

questions and we explained numerous answers at that time.

THE COURT: I have given you your opportunity to present your case. You wish more time?

MR. MOSKOWITZ: To comment to Your Honor about the various matters in the Judge Davis case is what I am really asking. I'm not sure what Your Honor means.

THE COURT: I have a guilty plea or nolo plea--that's guilty for sentencing purposes-- before Judge Davis--

MR. MOSKOWITZ: That's correct.

THE COURT: --for possession of counterfeit foreign obligations; that is, the certificates of deposit on a non-existent Panamian bank. Is that not correct?

MR. MOSKOWITZ: That's correct. And we submitted a lengthy input to the PSI which was incorporated into the PSI

by the probation officer at that time which basically explained the whole situation and matter and we had a long discussion before Judge Davis in that particular case describing basically the three areas of the case wherein the Government claimed criminality basically on Mr. Wasman's part: One was that the land in question was mortgaged--

THE COURT: Mr. Moskowitz, your client pled nolo.

MR. MOSKOWITZ: That's correct, he pled nolo and said that I'm not pleading because I'm guilty, I'm pleading because I want to get this matter behind me, and then we started this lengthy--

THE COURT: I don't think much of Alford pleas except in the situation where, as I recall, Alford pled guilty to first degree murder to avoid the risk of the chair.

MR. MOSKOWITZ: That was the nature though of our plea before Judge--

THE COURT: I try to avoid ever taking an Alford plea because I want a Defendant if, they think they're not guilty to have a chance for a jury to say so.

MR. MOSKOWITZ: All right. Well--

THE COURT: This is not Mr. Wasman's first time at bat as a Defendant in Federal Court. It was his first time at bat where you are claiming it was an Alford situation after a prior conviction and prior plea.

MR. MOSKOWITZ: Which was tendered to Judge Davis and which he accepted on those terms at that particular time. And like I said--

THE COURT: I understand that. But I'm not bound by Judge Davis' reasoning.

MR. MOSKOWITZ: I just want to indicate--

THE COURT: What I'm saying, on what is here before me, nolo plea to possession of counterfeit foreign obligations, namely -- as you admitted-- certificates of deposit on a Panamanian bank that doesn't exist which were used to lure investors into making investments--

MR. MOSKOWITZ: As I said--

THE COURT:--that would be sufficient in my book to revoke probation anytime. If there ever was a good cause for a probationer to be off the street that's it.

MR. MOSKOWITZ: Like I said, the facts in that case predated this particular case and imposition of sentence-

THE COURT: I have explained my position on that at great length. Hopefully, my long explanation on Case A and Case B will make some sense when I get

the chance to read the transcript.

MR. MOSKOWITZ: Very well.

THE COURT: If not, I shall modify it so that it does for the benefit of any appellate review, for that purpose.

Of course, Mr. Wasman, you have a right of appeal. Your appeal should be filed within ten days. The Clerk may be instructed to file a notice of appeal in your behalf.

You are instructed to advise your client, Mr. Moskowitz, and perfect an appeal if he desires to take one and--

MR. MOSKOWITZ: We will be filing a notice of appeal today.

THE COURT: --procedures available whereby you can take an appeal even if you don't have the funds to pay for it.

The Defendant is to report to the institution designated by the Bureau

of Prisons at his own expense on September 3, 1981 by 10:00 o'clock in the morning. If you don't care to do so at your own expense, you must report by that hour and on that date to the United States Marshal's Office in the Federal Courthouse, 300 Northeast First Avenue, Miami, Florida.

MR. MOSKOWITZ: We will be filing a notice of appeal today. We would be requesting an appeal bond.

THE COURT: Go ahead and file your motions. I will rule on them.

Bond continued on the same terms and conditions until the time of reporting.

(Thereupon, the foregoing proceedings were concluded.)

CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF BROWARD)

I, RUDY E. FOX, Official Court Reporter, do hereby certify that the foregoing transcript, consisting of pages numbered from 1 to 26, inclusive, contains a true and correct transcript of my shorthand notes as taken by me from a recording of the proceedings that took place at the time and place aforesaid.

DATED at Fort Lauderdale, Florida, this ___day of _____,1981.

Official Court Reporter

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5886

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MILTON R. WASMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 17, 11 Cir., 1983 _____F.2d_____). (June 2, 1983)

Before FAY and CLARK, Circuit Judges, and MARKEY*, Chief Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay

*Honorable Howard T. Markey, Chief Judge for the Federal Circuit, sitting by designation.

SUPREME COURT OF THE UNITED STATES

NO. A-1013

MILTON R. WASMAN,

Petitioner,

v

UNITED STATES

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner and the response filed thereto,

In view of the apparent conflict between the decision of the Courts of Appeals for the Eleventh Circuit and decisions of the Courts of Appeals for the Second and Ninth Circuit on an issue of some importance, it is ordered that the mandate of the United States Court of Appeals for the Eleventh Circuit, case No. 81-5886, be, and the same is hereby, stayed pending the timely filing and

disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue in effect pending the sending down of the judgment of this Court.

/s/ Lewis F. Powell

Associate Justice of the Supreme Court of the United States

Dated this 27th day of June, 1983